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No. 03-855

IN THE

Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,
Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED SOUTH AND EASTERN TRIBES, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The United South and Eastern Tribes, Inc. ("USET") is a non-profit, inter-tribal organization founded in 1968, comprising twenty-four federally-recognized tribal governments from an area stretching from Maine to Texas.[2] USET is dedicated to promoting Indian leadership, improving the quality of life for American Indians, and protecting Indian rights and natural resources on tribal lands.

Petitioner's contention that the federal courts can and must second-guess the determinations of the political branches as to the core fact of tribal recognition and must independently assess a Tribe's "continuous tribal existence" strikes deep at the concerns of USET's members. For the

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[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] The twenty-four member Tribes of USET are the Alabama-Coushatta Tribe of Texas; the Aroostook Band of Micmac Indians; the Catawba Indian Nation; the Cayuga Nation; the Chitimacha Tribe of Louisiana; the Coushatta Tribe of Louisiana; the Eastern Band of Cherokee Indians; the Houlton Band of Maliseet Indians; the Jena Band of Choctaw Indians; the Mashantucket Pequot Tribal Nation; the Miccosukee Tribe of Florida; the Mississippi Band of Choctaw Indians; the Mohegan Tribe of Connecticut; the Narragansett Indian Tribe; the Oneida Indian Nation of New York; the Passamaquoddy Tribe-Indian Township; the Passamaquoddy Tribe-Pleasant Point; the Penobscot Indian Nation; the Poarch Band of Creek Indians; the Seminole Tribe of Florida; the Seneca Nation of Indians; the St. Regis Band of Mohawk Indians; the Tunica-Biloxi Indians of Louisiana; the Wampanoag Tribe of Gay Head (Aquinnah).

better part of 150 years, this Court has expressly held that the decision of the federal political branches to recognize a Tribe is a political question that the federal courts may not review. Requiring Tribes to defend and reestablish their tribal status in court after having received federal recognition by the political branches represents an affront to Tribes, which have relied on the political branches' representations and determinations regarding their tribal status. Moreover, litigation concerning alleged tribal "discontinuity," particularly where, as in the instant case, a Tribe has been recognized by the federal government for centuries, threatens to turn all disputes involving the sovereignty of USET members into lengthy, expensive, and disruptive fact-specific inquiries into tribal history. Such inquiries place a tremendous strain on limited tribal resources. USET thus has a substantial interest in opposing petitioner's novel "continuity" attack and in ensuring that this Court affirms its longstanding precedent that the federal political branches' recognition of a Tribe is binding on the courts and all parties in all but the most unusual circumstances.

INTRODUCTION AND SUMMARY OF ARGUMENT

In an unbroken line of precedent spanning nearly a century-and-a-half, this Court has held that, once the political branches have recognized a Tribe, it is not the province of the judiciary to second-guess that determination and separately inquire into tribal existence. To the contrary, if the "political departments" have recognized a Tribe – as they have for centuries, in the case of the Oneidas – then "this court must do the same," *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866), for "it rests with Congress to determine when the relationship [between the Tribe and the United States] shall cease." *Winton v. Amos*, 255 U.S. 373, 392 (1921); *see also* Pet. App. 44a (same).

Entirely ignoring this line of cases, petitioner and its *amici* advance the novel argument that the federal courts hearing a claim under the Nonintercourse Act must conduct a searching inquiry to determine whether, for some ill-defined period over the course of a Tribe's history, there has been a temporary "lapse" in "tribal status." Petr. Br. 40-41, Br. for Cayuga County *et al.* at 4. According to petitioner, a Tribe has "no rights" under the Act unless the Tribe "has been in continuous tribal existence" from the time of the alleged violation. Petr. Br. at 40. *Any* lapse in tribal "continuity" – a vague concept that petitioner never defines – terminates a Tribe's rights. This is so regardless of whether the Tribe has been (as here) explicitly recognized by the political branches of the United States as the successor in interest to the Tribe that suffered the Nonintercourse Act violation. Indeed, in petitioner's view, even where (as here) a Tribe has been formally recognized by the United States for centuries, "continuity" remains at issue, and a court must independently evaluate the bedrock fact of tribal recognition at each moment in the Tribe's history.

Petitioner's view is not, and should not be, the law. No judicial inquiry into tribal status is necessary or appropriate in this case because respondent (1) has been deemed by the political branches to be the successor-in-interest entitled to assert the instant claim, and (2) has been recognized by the political branches as a Tribe and has never had such recognition withdrawn. In arguing otherwise, petitioner ignores entirely this Court's longstanding precedent establishing that matters of tribal recognition and tribal status are quintessential "political questions" into which courts should not intervene, except in the most extraordinary of circumstances. That precedent is well-grounded. The Constitution expressly vests broad power to recognize Tribes

in the political branches, through the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Executive's treaty-making and war powers, *id.* art. II, § 2, cls. 1-2, as well as the Executive's power to recognize foreign governments. Moreover, establishing a Tribe's status over the course of centuries is a massive undertaking, involving voluminous fact-gathering, informed by anthropological and historical expertise, to make what is, ultimately, a political judgment. Such an inquiry is ill-suited to judicial determination.

Rather than confront this case law, petitioner cites only a handful of lower court decisions in which courts found it necessary to make tribal status determinations to adjudicate Nonintercourse Act claims. But those cases involved Tribes that – unlike the Oneidas – were not federally recognized, and that had not maintained a long, documented history of formal treaty and trust relations with the United States. Because those Tribes lacked federal recognition, courts were required to assess the Tribes' status, including (*inter alia*) continuity of tribal leadership, to determine whether the Tribes were entitled to mount Nonintercourse Act claims. Those cases – which *expanded* the protection of the Nonintercourse Act beyond federally recognized Tribes – provide no support for a free-floating "continuity" inquiry for federally recognized Tribes.

Not only would requiring a full-blown inquiry into tribal continuity in every Nonintercourse Act case run counter to this Court's precedent, but it would impose a senseless burden on both Tribes and courts. A costly, resource-intensive analysis of the Oneidas' historical pedigree is pointless. The political branches have formally recognized the Oneidas, fulfilled their treaty obligations to the Oneidas for over two centuries, and, indeed, determined that the

Oneidas *are* the Tribe whose Nonintercourse Act rights were violated. In the face of such determinations, a judicial inquiry into tribal continuity erects a needless obstacle to a Tribe's assertion of its congressionally created rights.

Moreover, requiring federally recognized Tribes to reestablish their continuous existence whenever an opposing party raises the issue (or points to one or two questionable shards of evidence on the topic, which is all that petitioner has done here) would be an affront to Tribes, such as the Oneidas, that have relied upon their longstanding relationship with the United States government. Where the political branches have continuously recognized a Tribe throughout this Nation's history, and where the Tribe has managed, despite great adversity and patently illegal actions by the State, to remain intact as a Tribe, requiring the Tribe to undergo a searching tribal "continuity" each time it seeks to vindicate its rights would be as unjust as it is unprecedented.

ARGUMENT

I. TRIBAL "CONTINUITY" IS IRRELEVANT WHERE THE TRIBE AT ISSUE IS THE FEDERALLY RECOGNIZED SUCCESSOR IN INTEREST TO THE TRIBE WHOSE LAND WAS SOLD IN VIOLATION OF THE NONINTERCOURSE ACT.

Petitioner has made the unprecedented claim that the land at issue may not be deemed Indian country and that the Oneidas have *no* rights under the Indian Trade and Intercourse Act, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 177) ("Nonintercourse Act"), unless the federal courts conclude that "the Oneida Indian Nation has been in continuous tribal existence since the Properties became

subject to the Act." Petr. Br. at 40. The Oneidas' alleged "discontinuity" – a term petitioner never defines – is a red herring. When the political branches have determined that the Tribe raising a Nonintercourse Act claim is the successor in interest to the Tribe whose land was illegally sold, it is irrelevant whether the Tribe's existence was continuous. That is what the Second Circuit held, *see* Pet. App. 42a (holding that there is "no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land"), and that holding is correct.

Petitioner's contrary argument has no basis in law or logic. According to petitioner, "If there was a lapse in the Oneida Indian Nation's tribal status, [Nonintercourse Act] coverage and Indian country status both terminate at the moment in time when that lapse begins." Petr. Br. at 41. That argument – that any lapse terminates tribal status – is sufficiently extreme that even petitioner's *amici* reject it, acknowledging that "a one-year lapse in tribal identity, or even a five- or ten-year lapse, might not break the connection between the historic tribe's treaty rights and the modern group claiming those rights." Br. for Cayuga County *et al.*, at 8-9. In any event, the core claim of petitioner and its *amici* that there must be a judicial inquiry into continuity for *every* claim under the Nonintercourse Act is without foundation.

The Nonintercourse Act imposes no such requirement. Rather, the statutory text makes clear that a violation of the Act is complete at the moment that a conveyance of land takes place, without the consent of the United States, "from any Indian nation or tribe of Indians." 25 U.S.C. § 177. From that moment forward, the land transfer shall be of no "validity in law or equity." *Id.* It is undisputed that the

Oneidas were an "Indian nation or tribe of Indians" at the time of the sale of lands at issue here. Accordingly, the Oneidas have demonstrated the tribal status to needed to establish a Nonintercourse Act violation.

The only other issue relevant to tribal status is whether the plaintiff Tribe may seek to remedy the Nonintercourse Act violation. But that inquiry reflects only the standard requirement that plaintiff allege sufficient "injury in fact" – *i.e.*, that plaintiff "personally has suffered some actual or threatened injury" as a result of the defendant's allegedly illegal conduct – to have standing to bring the claim. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Franchise Tax Board of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 335 (1990). Where, as here, the plaintiff Tribe is indisputably the successor in interest of the Tribe that has suffered the Nonintercourse Act violation, then the plaintiff has alleged the "personal" connection to the alleged violation necessary to show "injury in fact," and the suit should be allowed to proceed. *Cf. South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 500 n.2 (1986) (adjudicating a Tribe's claims on the assumption that "respondent is the successor in interest of the Catawba Indian Tribe of South Carolina").

Petitioner, however, would require a plaintiff show continuous tribal existence. But petitioner offers no justification for imposing such a requirement, other than the conclusory assertion that *not* requiring continuity would be "illogical, circular and incorrect." Petr. Br. at 40. Moreover, petitioner's claimed requirement is inconsistent with general legal principles, under which plaintiffs routinely bring suit even though they may have lacked standing had they sued earlier. Indeed, the rule that petitioner suggests is in direct

conflict with the principle articulated by the Court that if a plaintiff has standing at the time of suit, no inquiry into past standing is necessary or appropriate. *See, e.g. Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1924 (2004) ("It has long been the case that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'") (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)).

Nor does petitioner's novel continuity test find any support as a matter of Indian law. Indeed, in *United States v. John*, 437 U.S. 653 (1978), this Court flatly rejected an analogous effort to invest tribal continuity with talismanic significance, holding that "[n]either the fact that the [Tribe is] merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." 437 U.S. at 653.[3]

Lacking any support from this Court's Indian law precedent or general legal principles, petitioner suggests nonetheless that the lower courts have imposed a tribal continuity requirement. *See* Petr. Br. at 40-41. But as the Second Circuit correctly concluded, *see* Pet. App. 42a & n.23, *none* of the cases cited by petitioner involved – as the instant case does – a determination by the political branches that the plaintiff Tribe was a successor in interest to the Tribe whose rights were violated. Rather, in each of those cases,

[3] Indeed, the discontinuity allegations in *John* were strikingly similar to those raised by petitioner. It was alleged that "since 1830 the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State, and that the Federal Government long ago abandoned its supervisory authority over these Indians." 437 U.S. at 652.

the court was faced with adjudicating a Nonintercourse Act claim in the absence of a federal determination that the Tribe was the proper party to bring the claim. Lacking relevant federal guidance, the courts looked to tribal continuity – among other factors – to determine whether the parties bringing suits were proper plaintiffs. Regardless whether a continuity analysis is appropriate in the *absence* of a determination by the political branches, there is no basis (and petitioner has pointed to no authority) for importing such a requirement when the political branches have determined that a Tribe is indeed a successor in interest.

Here, the political branches have spoken, declaring unambiguously that respondent is the successor in interest to the Oneida Tribe that signed the 1794 Treaty and whose land was subsequently sold in violation of the Nonintercourse Act. Demonstrating this most clearly, the United States pays annuities owed from the 1794 Treaty to respondent, as it has done for centuries. *Oneida Indian Nation v. Oneida County*, 434 F. Supp. 527, 538 (N.D.N.Y. 1977) ("The New York Oneidas still receive annuities under the 1794 Treaty with the Six Nations."). If respondent were not the political successor to the original Oneida Tribe – and if the political branches of the United States Government did not recognize respondent as such – then there would be no basis for such payments.

Moreover, the Executive Branch has submitted a sworn statement in the Oneidas' land claims litigation declaring that respondent is not only the successor in interest to the Tribe that signed the 1794 Treaty, but that the Tribes are actually one and the same. *See* JA 207 ("The Oneida Indian Nation of New York is one of the Indian tribes which entered into and signed the . . . Treaty with the Six Nations, dated November 11, 1794, 7 Stat. 43.").

These determinations are dispositive. As this Court has recognized, the federal government's determination that a particular sovereign government is a successor in interest to a prior sovereign presents a political question that the federal courts may not review. *See, e.g.*, *Terlinden v. Ames*, 184 U.S. 270, 288 (1902) (holding that Treaty obligation with the Kingdom of Prussia made prior to formation of the German Empire remained in force because "the question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and . . . the courts ought not to interfere with the conclusions of the political department in that regard"); *Clark v. Allen*, 331 U.S. 503, 514 (1947) (rejecting suggestion that treaty with Germany had necessarily terminated after World War II when Germany "had ceased to exist" and holding that "the question whether a state is in a position to perform its treaty obligations is essentially a political question"); *Luther v. Borden*, 48 U.S. (7 How.) 1, 12 (1849) (refusing, on political question grounds, to determine which of two competing state governments was legitimate).

Given these well-settled principles, it is unsurprising that every court to have considered the question has permitted respondent to enforce the rights belonging to the Oneidas who signed the 1794 Treaty of Canandaigua. *See, e.g.*, *Oneida Indian Nation v. United States*, 26 Ind. Cl. Comm. 138, 149 (1971), *aff'd*, 201 Ct. Cl. 546 (1973); *Oneida Indian Nation*, 434 F. Supp. at 532-33, 538, 540; *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 527-28, 539 (2d Cir. 1983); *Oneida Indian Nation v. New York*, 194 F. Supp. 2d 104, 118-19 (N.D.N.Y. 2002).

Those decisions are consistent with this Court's conclusion that the Oneidas are "direct descendents of members of the Oneida Indian Nation." *Oneida County v.*

Oneida Indian Nation, 470 U.S. 226, 230 (1985) (*Oneida II*); *see also id.* at 256 (Stevens, J., dissenting) (describing respondent Oneidas as "successors in interest" to the 1794 Tribe). Indeed, had the Court believed that respondent was not the successor in interest to the original Oneida Tribe, it could not have affirmed the decision in *Oneida II* because the Tribe would have lacked standing to bring its claim.

In short, respondent is the successor in interest to the Oneidas that were party to the 1794 Treaty of Canandaigua. Petitioner has pointed to *no* legal authority for an independent "continuity" requirement, particularly where, as here, the political branches have conclusively identified respondent as entitled to assert the Nonintercourse Act rights at issue. Accordingly, any alleged discontinuity in the Oneidas' existence provides no basis for reversing the Second Circuit's decision.[4]

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[4] Similarly meritless is petitioner's suggestion that, pursuant to *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), any tribal discontinuity requires a tribe to seek formal restoration of the land to trust status for the land to be exempt from taxation. *See* Petr. Br. at 41. Just as petitioner's Nonintercourse Act cases are inapposite, so is *Cass County*, because in *Cass County* – unlike here – Congress had expressed a "clear intent" to remove federal protection and "subject the land to taxation by making it alienable." 524 U.S. at 114. In contrast, here, far from withdrawing federal recognition, Congress has continually reaffirmed the Oneidas' status as a recognized Tribe.

II. BECAUSE THE POLITICAL BRANCHES HAVE NOT TERMINATED THE ONEIDAS' TRIBAL STATUS – AND INDEED HAVE CONTINUOUSLY TREATED THE ONEIDAS AS A TRIBE SINCE AT LEAST 1794 – ANY CONTINUITY REQUIREMENT HAS BEEN SATISFIED.

Even assuming that tribal continuity is relevant to the Oneidas' Nonintercourse Act claims, any continuity requirement is satisfied here. The political branches formally recognized the Oneidas as a Tribe in the 1794 Treaty of Canandaigua (if not earlier). Since that time, the federal government has continued to recognize the Oneida Tribe in numerous ways, including continuously satisfying the federal government's obligations under the 1794 Treaty.

Petitioner nevertheless argues that the Oneidas allegedly ceased to exist as a Tribe "in the late nineteenth and early twentieth centuries." Petr. Br. at 16. But that contention – meritless in any event, *see infra* pp. 25-29 – is misplaced. As nearly 150 years of case law from this Court make clear, tribal recognition is a quintessential political question, and it is for the political branches – not the courts – to determine when a federally recognized tribe ceases to exist. Indeed, this Court has never undertaken an independent "continuity" inquiry where federal government recognition is present.[5]

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[5] In *United States v. Joseph*, 94 U.S. 614 (1876), the Court determined that a federally recognized Tribe – the Pueblos – were not protected under the Nonintercourse Act. "Continuity" had nothing to do with the Court's decision, however, which was based on a inquiry into the Tribe's "degree of civilization." 94 U.S. at 617. Moreover, the *Joseph* inquiry was subsequently disavowed by this Court. *See, e.g., United States v. Sandoval*, 231 U.S. 28, 48-49 (1913) (declining to follow *Joseph* and agreeing

Petitioner's contention that the federal courts should, in all Nonintercourse Act cases, independently consider whether a federally recognized Tribe ceased to exist at some point in its history goes to the heart of the concerns that animate the political question doctrine. It would embroil the courts in difficult factual and historical disputes that the courts are ill-equipped to manage and that litigation is poorly designed to resolve. Moreover, such an inquiry poses an array of questions that defy judicially manageable standards and that require political rather than legal judgments: What does "continuity" mean and how is it measured? How long a "discontinuity" is required to terminate tribal existence? What sources are authoritative to determine these matters?

Thus, in trying to prove that the Oneidas were sufficiently "discontinuous" that they ceased to exist, petitioner misunderstands the relevant continuity inquiry. The question is not whether (as an ill-defined "factual" matter) the Tribe ceased to exist, but whether the political branches have formally terminated tribal existence. Here, where the federal government has never formally terminated the Tribe and, to the contrary, has continuously recognized the Tribe for more than 200 years, any continuity requirement is unequivocally met.

"with the long-continued action of the legislative and executive departments" recognizing the Pueblos as a Tribe); *United States v. Candelaria*, 271 U.S. 432, 441-42 (1926) (disavowing *Joseph* and determining that the Pueblos were indeed a Tribe covered by the Nonintercourse Act); *United States v. Chavez*, 290 U.S. 357, 363 (1933) (noting that in *Sandoval*, the Court had "disapproved and declined to follow the decision" in *Joseph*). Notably, petitioner's *amici* cite *Joseph* in support of their challenge to the Oneidas' tribal status, without noting this Court's subsequent repudiation of that case. *See* Br. for Cayuga County *et al.*, at 21.

A. Once The United States Has Recognized A Tribe, It Is For The Political Branches – And Not The Courts – To Determine If And When The Tribe Ceases To Exist.

1. Recognition of Tribes and the termination of tribal existence are matters committed to the political branches. For nearly 150 years, this Court has consistently held that tribal recognition is a "political question," which shall not be disturbed by the courts. *See Baker v. Carr*, 369 U.S. 186, 215 (1962) (describing the Court's "deference to the political departments in determining whether Indians are recognized as a tribe," because this inquiry has "familiar attributes of political questions"); *Miami Nation of Indians of Indiana, Inc. v. United States Dep't of Interior*, 255 F.3d 342, 347 (7th Cir. 2001) (Posner, J.) (noting that tribal recognition "lies at the heart of the doctrine of 'political questions.'").[6]

In *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866), for example, this Court refused to disturb an Interior Department recognition of the Michigan Chippewa Indians, despite arguments that certain treaty language could be read to have effected the dissolution of that Tribe:

[6] *Baker v. Carr* described the determination of tribal status as a paradigm example of a non-reviewable political question that directly implicates the separation of powers rationales for the political question doctrine: "a textually demonstrable constitutional commitment of the issue to a coordinate political department," "a lack of judicially discoverable and manageable standards for resolving it," "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217.

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

70 U.S. at 419. Similarly, in *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1867), the Court rejected attempts by the State of Kansas to tax certain Indian Tribes, where those Tribes were recognized by the Interior Department: "As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws." 72 U.S. at 757.[7]

Deference to the political branches is particularly warranted concerning the issues of termination or cessation

[7] Leading treatises and scholars recognize that the courts may not disturb a tribal recognition determination by the political branches. *See, e.g.*, Felix S. Cohen, *Handbook of Federal Indian Law* 3 (1982 ed.) ("When Congress or the Executive has found that a tribe exists, courts will not normally disturb such a determination."); 13A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3534.2 (2d ed. 1984) ("As to 'distinctly Indian communities,' it is accepted that Congress, not the courts, is to determine the extent to which 'they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States.'"); Robert N. Clinton & Margaret T. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 64 (1979-80) ("[T]he courts will neither review the tribal status of a federally-recognized tribe nor disturb the prior recognition of a tribe by the federal government.").

of tribal status. Once a group of Indians is recognized as a Tribe, "[w]hen they shall be let out of that state is for the United States to determine without interference by the courts or by any state." *United States v. Rickert*, 188 U.S. 432, 443 (1903); *see, e.g.*, *Winton*, 255 U.S. at 392 (explaining that, with respect to tribal recognition, "it rests with Congress to determine when the relationship shall cease"); *United States v. Waller*, 243 U.S. 452, 459 (1917) (describing as "well-settled" the principle that the power to end tribal recognition "rests with Congress"); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 316 (1911) (explaining "that it rests with Congress to determine when its guardianship [over particular Indians] shall cease"); *Chippewa Indians v. United States*, 307 U.S. 1, 4 (1939) (rejecting arguments made that the Chippewa tribe had dissolved, where Congress recognized the tribe and "did not intend to surrender its guardianship over the Indians or treat them otherwise than as tribal Indians"); *see also United States v. John*, 437 U.S. at 650; *accord* Pet. App. 44a ("Once a tribe has been recognized, the removal of that recognition . . . is a question for other branches of government.").[8]

This long line of precedent is not surprising. The Constitution vests Congress and the Executive Branch, and not the Judicial Branch, with the power to recognize Tribes. Most prominently, the "Indian Commerce Clause" of the Constitution explicitly grants Congress power "[t]o regulate

[8] Congress has made explicit its own view that the courts have no role in tribal termination decisions. The Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, contains an express finding that by Congress that it alone has the power to terminate a recognized tribe. *Id.* § 103(4) ("The Congress finds that . . . a tribe which has been recognized [by Congress, by the federal acknowledgement process, or by the courts] may not be terminated except by an Act of Congress.").

Commerce . . . with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, and has been recognized as the basic source of Congress's "plenary power" with respect to Indians. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). Moreover, the Executive Branch has such powers in its own right, through Article II's treaty-making and war powers, *see* U.S. Const. art. II, § 2, cls. 1-2; *Morton*, 417 U.S. at 552 (recognizing this source of power), and the authority to recognize foreign governments, *see, e.g.*, *United States v. Lara*, 124 S. Ct. 1628, 1644 (2004) (Thomas, J., concurring) (citing *United States v. Pink*, 315 U.S. 203, 228-30 (1942)).[9]

Tribal recognition is "[a] formal political act" that "permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation,'" and "institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status." H.R. Rep. No. 103-781, at 2-3 (1994) (footnote omitted). Thus, the acknowledgement of sovereign status is quintessentially a

[9] In other contexts, the precise boundaries between the power of the Executive Branch and that of Congress remain subject to debate. *See, e.g.*, *Lara*, 124 S. Ct. at 1642-43 (Thomas, J., concurring). That debate is largely academic here, however, because Congress has delegated power over tribal management and regulation to the Executive Branch, *see* 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457, giving that Branch unquestioned authority to recognize Indian tribes. *See Miami Nation*, 255 F.3d at 345 (Posner, J.). Regardless how power is allocated as between the political branches, the critical point here is that the recognition power unquestionably belongs to the political branches, rather than the judiciary.

political judgment, one in which the courts' competence is at its nadir. *See, e.g.*, *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.").

Petitioner's suggestion that the Oneidas must satisfy the definitional test for a "Tribe" set forth in *United States v. Candelaria*, 271 U.S. 432, 442 (1926), and *Montoya v. United States*, 180 U.S. 261, 266 (1901), is thus misguided. Petr. Br. at 40-43. In *every single case* cited by petitioner for its claim that the judiciary must inquire into tribal status, the federal government had *not* recognized the Tribe at issue and had *not* made any determination as to tribal continuity. *See* Pet. Br. at 40-41 (citing *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994); *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987) (*Mashpee II*); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 & n.7 (D. Mass. 1978), *aff'd*, 592 F.2d 575 (1st Cir. 1979) (*Mashpee I*)). In the absence of formal recognition by the political branches, courts have, with understandable reluctance, applied the *Candelaria* analysis.[10] Those cases do not implicate the political question doctrine, however, because the political branches have not acted.

Indeed, Petitioner turns this line of cases on its head. *See* Petr. Br. 41. Those cases – all of which concerned Tribes

[10] The Nonintercourse Act applies to "any . . . tribe of Indians," 25 U.S.C. § 177, not just federally recognized tribes. *See, e.g.*, *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 & n.8 (1st Cir. 1975); *Mashpee I*, 592 F.2d at 581.

that had not yet received federal recognition – merely hold that federal *non-recognition* does not foreclose a Nonintercourse Act claim. *See, e.g.*, *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 (1st Cir. 1975) (finding "nothing in the Act to suggest that 'tribe' is to be read to exclude a bona fide tribe not otherwise federally recognized," and that "an inclusive reading [is] consonant with the policy and the purpose of the Act").

It is thus irrelevant that, in conducting the tribal inquiry where federal recognition is absent, courts have examined whether the Tribe has existed on a substantially continuous basis since the time of the alleged violation of the Nonintercourse Act. *See, e.g.*, *Mashpee I*, 592 F.2d at 581, 585 (assessing "continuity of leadership" and other factors to determine the Mashpees' standing and right to recovery under the Act, where "[t]he federal government has never officially recognized the Mashpees as a tribe or actively supported or watched over them"). Simply because courts may evaluate tribal continuity, among other factors, in determining whether a non-federally recognized Tribe may mount a Nonintercourse Act claim, it does not follow that courts must, in all cases, make an independent determination that a Tribe "has been in continuous tribal existence since the Properties became subject to the Act." Petr. Br. at 40. No court has used that analysis to independently assess tribal status and ultimately deny such status to a federally recognized Tribe. *See* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 Am. Indian L. Rev. 37, 64-65 (1992) (summarizing cases). The case law

cited by petitioner thus has no application to a federally recognized Tribe such as the Oneidas.[11]

Not only is it well-supported in precedent, but the principle that the courts should not second-guess the determinations of the political branches by applying *Candelaria* or otherwise inquiring independently into continuous tribal existence is a sound one. Absent federal recognition, disputes about tribal existence are frequently difficult, historical, fact-intensive, and policy-laden – precisely the sort of disputes that courts are ill-suited to

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[11] Nor can this line of cases be read to establish that a Tribe may voluntarily abandon its protected status for purposes of the Nonintercourse Act. *Cf.* Petr. Br. 42. To the extent these cases suggest such a principle, however, they do not concern the situation of Tribes that continue to be federally recognized. Indeed, "[a]s an operative judicial principle, voluntary abandonment of tribal status presumably must be limited to non-recognized tribes. Insofar as other branches of the federal government continue to recognize the tribal status of a group of Indians, judicial, and more importantly jury, review of that question would appear precluded by the political question doctrine." Clinton & Hotopp, *supra*, at 67; *see also Rickert*, 188 U.S. at 443 (ending tribal status "is for the United States to determine without interference by the courts or by any state."). *Cf. Terlinden*, 184 U.S. at 287 ("Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States.'") (internal quotation and citation omitted); *Charlton v. Kelly*, 229 U.S. 447, 475-76 (1913) (holding that a treaty treated by the United States as binding was binding, despite the efforts of treaty-partner to exempt itself from that treaty); Cohen, *supra*, at 18 ("any continuing organization, however informal, would deny the abandonment of tribal existence").

resolve. *See, e.g. Golden Hill*, 39 F.3d at 60 (staying case on primary jurisdiction grounds to permit agency to make tribal determination in light of need to resolve "issues of fact not within the ordinary ken of judges and which requir[e] administrative expertise'") (quoting *Far East Conference v. United States*, 342 U.S. 570, 574 (1952)); Clinton & Hotopp, *supra*, at 67 (discussing the "general confusion in the courts over the nature of the evidence required to prove tribal existence" where federal recognition is lacking); Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 New Eng. L. Rev. 491, 495 (2003) (detailing the extensive process for tribal recognition employed by the Executive Branch, including the use of "a professional research team . . . . with specialized knowledge and experience in acknowledgment" to conduct an "extensive factual analysis" involving "30,000 pages to over 100,000 pages of documents").

Moreover, allowing court challenges to tribal existence in the face of explicit federal recognition by the political branches would be tremendously destabilizing – for Tribes and their members, for all that do business with them, and for the political branches as well. Although petitioner's attempted collateral attack on the Oneidas' tribal status arises in the context of the Nonintercourse Act, petitioner's proposed framework is arguably relevant not just to land claims, but to *all* assertions of sovereign authority by Tribes. Forcing Tribes to litigate and courts to resolve such matters in any lawsuit in which tribal status is conceivably implicated would waste judicial resources and impose a substantial financial and psychological burden on the Tribes. Even federally recognized Tribes would be required to amass a voluminous historical record to reestablish their tribal status in *any* case in which the tribal status is challenged.

Such a rule is patently unfair – indeed, an affront – to federally recognized Tribes, such as the Oneidas, that have relied on their longstanding treaty and trust relationship with the United States. Where there is official federal recognition, repeated relitigation of these issues imposes great costs with no corresponding benefit.

Challenges to tribal status are especially unwarranted in cases involving land claims because much of the potential evidence of discontinuity – *e.g.*, a reduction in tribal land – stems from the State's own unlawful purchase of the land in the first place. To hold that a Tribe's claim for illegally sold land is precluded by the Tribe's loss of that very land is the height of caprice. *Cf. Mashpee II*, 820 F.2d 480 (refusing to hold that the political branches are "estopped" from denying federal recognition to a Tribe, where the government bears responsibility for the Tribe's deterioration).

2. The case law just discussed disposes of petitioner's continuity attack. It is undisputed that the Oneidas were recognized by federal treaty as a Tribe in 1794, and neither petitioner nor Judge Van Graafeiland's dissent points to any formal (or informal) action by the political branches purporting to terminate tribal existence. The absence of such federal action withdrawing recognition at any time since 1794 conclusively established tribal continuity.[12]

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[12] Although this Court has not sought to catalogue exhaustively how the political branches can manifest their view that a Tribe no longer exists, it is clear that such intent will not be inferred absent a clear statement from Congress. *See United States v. Dion*, 476 U.S. 734, 738-39 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain."). Indeed, a clear statement requirement follows from this Court's repeated holdings that state taxation of Indian land will not be allowed unless Congress had made its intent to allow such taxation clear. *See, e.g., County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985)). Allowing the State to establish discontinuity at trial (and thus permit state taxation) without any clear statement from Congress would undermine this settled and oft-cited doctrine.

Nor is the absence of formal congressional or executive action withdrawing recognition the only relevant consideration here. To the contrary, the political branches have for more than 200 years continued to make payments to the Oneidas pursuant to the 1794 Treaty of Canandaigua. The political branches' unbroken fulfillment of their treaty obligations is an unmistakable affirmation by the political branches that the Oneidas have continuously existed.

Finally, the United States' present-day federal recognition of the Oneidas, *see, e.g.*, 68 Fed. Reg. 68,180 (Dec. 5, 2003) (annual list of federally recognized Tribes) – separate and apart from its longstanding historical relationship with the Tribe – is additional evidence that the political branches have not only failed to terminate tribal existence, but have affirmatively made a determination of continuity. Inherent in federal tribal recognition is a judgment that the Tribe has existed on a continuous enough basis to be recognized as the same historic entity with which the government has had relations throughout the history of the Nation:

> [T]he administrative decision to acknowledge a tribe acknowledges that an inherent sovereign still exists. The Department is not 'granting' sovereign status or powers to the groups, nor is it creating a tribe made up of its Indian descendants, when it determines that

> a group is an Indian tribe. Rather, the Department is acknowledging that the sovereign has existed continuously since historic times, retaining its inherent powers.

Coen, *supra*, at 499; *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994) ("Federal recognition is just that: recognition of a previously existing status."). Indeed, "[t]he Department [of the Interior]'s position is, and has always been, that the essential requirement for acknowledgement is continuity of tribal existence rather than previous acknowledgement." 59 Fed. Reg. 9280, 9282 (Feb. 27, 1994). Federal recognition thus belies petitioner's claim that the existence *vel non* of continuity is an open question for the courts to determine.

B. To The Extent That The Courts Have Any Role In Reviewing Tribal Status Or Continuity, That Role Is Not Implicated Where The Evidence Overwhelmingly Demonstrates A Tribe's Longstanding And Continuous Existence.

Notwithstanding the political nature of determinations of tribal recognition and continuity, certain language from this Court's opinions has postulated an extremely narrow role for courts in policing the outer boundary of tribal recognition decisions. For example, in *United States v. Sandoval*, 231 U.S. 28 (1913), this Court cautioned that Congress may not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." 231 U.S. at 46. This Court has also stated that, with respect to tribal recognition, the Court "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Baker*, 369 U.S. at 217. But neither petitioner nor the Second Circuit dissent contends that the Executive

Branch's determination of continuous tribal existence is "manifestly unauthorized" so as to fall within this narrow exception.[13]

Nor could they. Based on the historical relationship between the federal government and the Oneidas (which has involved the United States' longstanding compliance with its treaty obligations, including the yearly payment of annuities), the political branches' recognition of the Oneidas both as a continuously existing Tribe and as the successor in interest to the original Oneida Tribe is reasonable and supported by substantial evidence. Indeed, this Court has already acknowledged that the current Oneidas are descended from the original Oneidas, *see Oneida II*, 470 U.S. at 230, so there is no serious argument that the Court's concern in *Sandoval* and *Baker v. Carr* – one of political arbitrariness – exists here.

In light of this substantial evidence supporting the federal government's determination of tribal existence and

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[13] Although this Court has never articulated the precise standards it would use to assess whether a tribal status determination made by the political branches was "manifestly unauthorized," *Baker*, 369 U.S. at 217, such review could be no *more* searching than the deferential review under the Administrative Procedures Act ("APA") that applies to tribal recognition decisions made pursuant to the federal acknowledgement regulations. *See, e.g., Miami Nation*, 255 F.3d at 348 (reviewing a federal acknowledgement determination under APA standards); 5 U.S.C. § 706 (APA standard of review). This Court need not determine here, however, whether the APA standard or an even more deferential standard of review would be appropriate, because, as demonstrated below, the United States's recognition of the Oneidas and their continuous existence would satisfy even the more searching APA standard of review.

continuity – namely, the longstanding annuity payments and the continuous relationship with the Tribe since 1794 – the few pieces of contrary evidence and stray statements by government officials that petitioner cobbles together are insufficient to call into question the political branches' decision under the deferential standard of review suggested by *Sandoval* and *Baker v. Carr*.

First, petitioner points to *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877), *see* Pet. Br. 43, and its language stating that the Oneida "tribal government has ceased," and that "[t]hey do not constitute a community by themselves." 25 F. Cas. at 1008. As an initial matter, *Elm* was based on a false premise: that Elm could not be a citizen (and thus had voted illegally) unless the Oneidas ceased to exist as a tribe. *See id.* at 1006-07. This Court has rejected that premise, *see, e.g.*, *United States v. Nice*, 241 U.S. 591, 598 (1916) (explaining that "[c]itizenship is not incompatible with tribal existence"), and *Elm* is thus entitled to little if any weight on the question of tribal continuity. Moreover, the *Elm* court *recognized* the functioning of the Oneida Tribe, which appointed chiefs and received annuities. *See* 25 F. Cas. at 1008. Thus, viewed in proper and modern perspective, *Elm* does not hold that the Oneidas ceased to exist. Indeed, that same court subsequently decided in *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *aff'd*, 265 F. 165 (2d Cir. 1920), that the Oneidas were a Tribe in continuous occupation of reservation land and had "not abandoned their tribal relations." *Id.* at 477-78, 481, 486. Given the respective nature and depth of these cases, *Boylan* provides the more credible account of the Oneidas' status; at the very least, it demonstrates the federal government's conclusions regarding tribal continuity are not arbitrary.

Second, petitioner cites to short excerpts from six government reports between the years 1891 though 1906, each of which allegedly establishes that the Oneidas ceased to exist. *See* Petr. Br. 43-45. Five of these six citations, however, are from United States reports that merely claim that the Oneidas have no reservation – not that their tribal structure ceased to exist. Tribal existence and reservation occupation are distinct issues, and petitioner's "evidence" thus does nothing to undermine the case for the Oneidas' continuous existence.[14] Moreover, these excerpts concerning reservation land are overwhelmed by extensive other evidence from that time period establishing that the Oneidas existed as a Tribe and, indeed, inhabited a reservation. For example, the Annual Reports of the Commissioner of Indian Affairs cited by petitioner reveal that the Oneidas existed throughout this time period, in substantial numbers, occupying a 350-acre "Oneida reserve," *see* 1870-1920 *Comm'r of Indian Affairs Ann. Reports*, and the maps accompanying those Annual Reports all display an Oneida Reservation for this challenged time period, *see id.*[15]

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[14] For the same reason, petitioner's citation of a 1950 Senate Report concerning the Oneidas' reservation, *see* Petr. Br. 45, proves nothing about the Oneidas' tribal status. In contrast, the Oneidas' tribal existence that year is demonstrated by correspondence from the Bureau of Indian Affairs memorializing the United States' payment of annuities to the Oneidas in 1950. *See* Letter from Bureau of Indian Affairs to William Rockwell (Oneida chief) of Aug. 28, 1950.

[15] The sixth source cited by petitioner for this time period is a New York census map from 1892, which "depicts no Oneida Reservation." Petr. Br. at 44. However, other portions of 1892 United States Extra Census Bulletin – which contains the cited map – confirm the Oneidas' tribal existence in that year. Among

Moreover, this is but a small portion of the evidence supporting the Tribe's continuous existence throughout the period from 1891-1906, when petitioner claims the Oneidas ceased to exist. New York's state census in 1892 and 1905 included population enumerations for the Oneida Reservation, *see* Francis M. Hugo, *Manual for Use of the Legislature of the State of New York* 270 (1918); Bureau of Indian Affairs census rolls throughout the period included populations of Oneidas, *see New York Iroquois Censuses, 1886-1924* (Heritage Books 2001); and newspaper reports throughout the period described meetings of the general council of the Oneida as well as the participation of the Oneidas in the Six Nations Council, *see, e.g.*, Oneida Semi-Weekly Union, July 15, 1893, at 2. Again, at the very least, this considerable evidence of the Oneidas' tribal existence neutralizes petitioner's scant evidence to the contrary and demonstrates that substantial evidence supports the federal government's recognition of the Oneidas' continuous existence.

Finally, petitioner points to two scraps of evidence post-dating *Boylan* (which confirmed the Oneidas' status as a Tribe). *See* Petr. Br. at 45. But the 1925 letter of an inferior

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other things, that Census Bulletin describes the Oneidas' population (212), depicts the Oneida Tribe's chiefs, and discusses the payment of annuities to the Tribe. *The Six Nations of New York: The 1892 United States Extra Census Bulletin* 6, 77-78 (Cornell Univ. Press 1995). Moreover, the 1892 Report of the Commissioner of Indian Affairs belies the census map cited by petitioner, as it both refers to the "Oneida Reserve" and displays the Oneida Reservation on an accompanying map. *See* 1892 *Comm'r of Indian Affairs Ann. Report*. Thus, at the very least, substantial evidence supports the political branches' conclusion that the Oneidas have existed continuously, including in 1892.

government official proves nothing, given the United States government's official position, as reflected in *Boylan* and elsewhere, that the Oneidas existed as a Tribe. Petitioner's snippet from Cohen's 1942 treatise likewise proves nothing, as Cohen was merely quoting from a 1915 memorandum (*i.e.*, pre-dating *Boylan*), which he did not present as historical fact.

In the face of the substantial – indeed, overwhelming – evidence of the Oneidas' continuous tribal existence, the sources cited by petitioner come nowhere close to raising a question of fact that would implicate the "arbitrariness" limitation alluded to in *Sandoval* and *Baker v. Carr*. Thus, there is no basis for disturbing the Second Circuit's affirmance of the grant of summary judgment on the question of continuous tribal existence. Pet. App. 44a.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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